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Supreme Court, U.S.
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No. ____

IN THE

Supreme Court of the United States

ERICSSON INC.; ERICSSON STANDARD SEVERANCE PAY PLAN; ERICSSON TOP CONTRIBUTOR ENHANCED SEVERANCE PAY PLAN OF 2004

Petitioners

v.

RITESH AHUJA

Respondent.

On Petition For Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR WRIT OF CERTIORARI

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SEPTEMBER 8, 2008

QUESTION PRESENTED

In *Firestone Tire & Rubber Co. v. Bruch*, this Court held that challenges to benefit eligibility decisions under section 1132(a)(1)(B) of ERISA are subject to a deferential abuse of discretion standard of review when benefit plans expressly confer discretionary authority on plan administrators to determine benefit eligibility or construe plan terms.

The question presented here is whether a court that reviews a plan administrator's discretionary construction of plan language may engage in *de novo* review of the plan by simply declaring language "unambiguous," thereby circumventing the discretion this Court applied and recognized in *Firestone*.

Or, must a reviewing court, as other courts of appeals and this Court, consider the administrator's interpretation of plan language as a *factor* in deciding whether the administrator abused its discretion in denying ERISA benefits, thereby requiring courts to undergo a more thorough scrutiny of administrators' decisions before stepping into the role of the administrator.

In other words, may a court claim to follow *Firestone*, notwithstanding its failure to perform a full and through review of the entire administrative record, the plan's language, and the plan's purpose, and strip all discretion from the administrator absent any showing of an abuse of that discretion.

LIST OF PARTIES

No parties participated in the litigation of this case other than the parties listed in the caption.

RULE 29.6
CORPORATE DISCLOSURE STATEMENT

Ericsson Inc. is a wholly-owned subsidiary of Ericsson Holding II Inc., which is a wholly-owned subsidiary of Telefonaktiebolaget LM Ericsson, a publicly-traded company.

Ericsson Standard Severance Pay Plan is a welfare benefit plan sponsored and administered by Ericsson Inc.

Ericsson Top Contributor Enhanced Severance Pay Plan of 2004 is a welfare benefit plan sponsored and administered by Ericsson Inc.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Ericsson Inc., Ericsson Standard Severance Pay Plan, and Ericsson Top Contributor Enhanced Severance Pay Plan of 2004 (collectively "Petitioners") respectfully submit this petition for a writ of certiorari to review the judgment of the Fourth Circuit Court of Appeals.

OPINIONS BELOW

The United States District Court for the District of Maryland's February 5, 2007 order and opinion granting Petitioners' summary judgment motion and denying Respondent's cross-motion for summary judgment are reproduced in the Petition Appendix ("App.") at pages 11-29. *See Ahuja v. Ericsson Inc.; Ericsson Standard Severance Pay Plan; Ericsson Top Contributor Enhanced Severance Pay Plan of 2004*, No. 05cv3423 RWT (D. Md. Feb. 5, 2007).

The United States Court of Appeals for the Fourth Circuit's May 12, 2008 judgment reversing and remanding the district court's order and opinion is reproduced in the Petition Appendix at pages 1-10 and may also be found on Westlaw at *Ahuja v. Ericsson Inc.*, No. 07-1196, 2008 WL 2018449 (4th Cir. May 12, 2008). The Fourth Circuit's June 10, 2008 denial of petitioner's petition for rehearing and rehearing en banc is reproduced in the Petition Appendix at page 31.

JURISDICTION

Petitioner is seeking review of the Fourth Circuit's May 12, 2008 judgment. The Fourth Circuit denied petitioner's petition for rehearing and rehearing en banc on June 10, 2008. This Court has jurisdiction to review Petitioner's Petition for Writ of Certiorari pursuant to 28 U.S.C. § 1254(1), 28 U.S.C. § 1331, and 29 U.S.C. § 1132.

CONSTITUTIONAL, STATUTORY, OR OTHER LEGAL PROVISIONS

The relevant provision of the Employee Retirement Income Security Program Act ("ERISA"), is as follows:

> **Civil Enforcement (a) Persons empowered to bring a civil action.**--A civil action may be brought--**(1)** by a participant or beneficiary--**(B)** to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan . . .

29 U.S.C. § 1132(a)(1)(B).

STATEMENT OF THE CASE

For a number of years, the Fourth Circuit has gradually and carefully developed, through a series of its opinions, an exception that effectively reverses this Court's *Firestone* standard of review in judicial reviews of ERISA benefit determinations. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989). The Fourth Circuit has not been so bold as to expressly state its change of the standard. Rather, the court went about this change in such a gradual manner that, but for its decision in this case, the change was not obvious. In this context, the court, slowly and deliberately, through a series of opinions, each of which built and relied on other and earlier cases, inched its way over the years to arrive at the change so as to avoid detection of its decision to erode and change the *Firestone* standard of review.[1]

Nowhere did the Fourth Circuit more blatantly and boldly disregard *Firestone* than in this case, wherein the court stated that ***no*** discretion need be afforded a plan administrator's benefit decision so long as the courts, correctly or incorrectly, characterized the plan language as unambiguous.[2]

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[1] The Fourth Circuit is not alone in its creation of law that is designed to circumvent *Firestone* -- three other circuits employ this same method, albeit not as boldly as the Fourth Circuit.

[2] The Fourth Circuit devoted about four pages of its short opinion "explaining" why the language was unambiguous. (App. 6-9) It never addressed the district court's lengthy opinion trying to understand the Plan language or why the district court stated there was a "special place in hell" for the person who drafted such an ambiguous plan.

The Fourth Circuit's apparent desire to decide which employees should receive benefits also led it to employ a different tool for plan provisions that it claims are *ambiguous* -- the court identifies a conflict of interest between the plan and the administrator that allows it to minimize the administrator's discretion to such a degree that it can, again, play the role of administrator. *Carolina Care Plan Inc. v. McKenzie*, 467 F.3d 383, 389 (4th Cir. 2006), *cert. dismissed*, 128 S. Ct. 6 (2006).

These tools combined give the Fourth Circuit "authority" to substitute itself for administrators, whether it characterizes plan language as ambiguous or unambiguous, and achieve results the court prefers rather than results *Firestone* dictates. This unfettered authority placed into the hands of the court is exactly the abuse this Court sought to prevent in *Firestone*.[3]

In its role as an administrator unfamiliar with the Plan and the history of the Plan, the Fourth Circuit proceeded to select the *section* of the plan to review *de novo*, ignoring the remainder of the Plan.[4] Using this method, the Fourth Circuit not only devised a subtle method of circumventing *Firestone*, it devised a method to ensure its desired result, that is, perform an "abridged" *de novo*

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[3] In this case, Respondent never claimed a conflict of interest by the Administrator, which left the Fourth Circuit with no choice but to characterize the ambiguous Plan language as "unambiguous" to reach the decision the court preferred.

[4] The court completely ignored both the express and written purpose of the Plan and other Plan sections, which are at direct odds with its interpretation of the ***one*** provision on which it based its decision.

review focusing only on the plan section that will favor the outcome.

Accordingly, having claimed itself entitled to review the Plan *de novo*, the Court below reviewed only the section it deemed most favorable to Ahuja notwithstanding that its interpretation of the section contradicted the express written purpose of the Plan and other Plan language. The Fourth Circuit utterly failed to conduct a complete *de novo* review, which would have entailed a review of the entire Plan.

Courts that conduct *de novo* reviews of plans in blatant disregard of *Firestone's* standards while contending their disregard complies with *Firestone* engage in conduct that only this Court's supervisory power can rectify. Addressing this issue is critical to the continued stability of ERISA and the continued willingness of employers to voluntarily provide welfare benefits to employees that otherwise are not mandated.

FACTUAL BACKGROUND

Ericsson IP Infrastructure Inc., one of the Ericsson group of companies ("Ericsson"), employed Respondent Ritesh Ahuja ("Ahuja") at its Rockville, Maryland facility for eight years. In 2005, Ericsson closed its Rockville office and consolidated operations in Raleigh, North Carolina. Ericsson offered Ahuja a transfer to Raleigh in the same position, same salary, and with full relocation benefits. Ahuja declined the offer. With the Rockville office closed and Ahuja refusing to transfer, Ericsson had no choice but to terminate Ahuja's employment, effective June 17, 2005.

At the time of his termination, Ahuja participated in the Ericsson Standard Severance Plan and in the "Top Contributor Enhanced Severance Plan of 2004" ("Enhanced Plan"), both governed by ERISA. Only the Enhanced Plan is implicated in this Petition.

Under the Enhanced Plan, only "Top Contributors," defined as those employees "who [are] vital to the business interests of Ericsson Inc." and whose ***retention*** is "of strategic importance to the company," were eligible for benefits. The Enhanced Plan granted the administrator discretion to "interpret and construe" plan language.

The Enhanced Plan provided severance of six months salary if Ericsson involuntarily terminated participants' employment. It did not provide, however, benefits if participants were offered continued employment and were terminated because they refused the continued employment. The stated purpose of the plan was to "retain" key

employees; to pay benefits to key employees notwithstanding their rejection of continued employment defeated the express written purpose of the Enhanced Plan.

When Ahuja's employment terminated, Ericsson did not offer him enhanced severance benefits. Ahuja requested payment of benefits under the Enhanced Plan, but the Plan Administrator denied Ahuja's request because Ahuja rejected the transfer.

In its denial, the Plan Administrator cited paragraph 8(b) of the Plan, which provides:

> Sale or Merger of Ericsson. Should all or any part of Ericsson or its assets or business to which a participant is assigned be sold, assigned, transferred, spun-off, reorganized, or merged with another entity, *the participant will not be eligible for Enhanced Severance Benefits under this Plan if he or she is offered continuing employment with such entity regardless of whether the participant accepts the offer of employment and regardless of whether such offer is on comparable terms and conditions as the employee's current employment.*

The Plan Administrator noted that Ahuja's offer of continued employment as a result of Ericsson's reorganization rendered Ahuja ineligible for benefits.

In short, the Administrator found: (1) Ericsson underwent a reorganization in which it transferred assets and employees from Rockville to its new headquarters in Raleigh; (2) Ericsson offered Ahuja a position at the Raleigh location with a full relocation package; and (3) Ahuja was not entitled

to benefits under the Enhanced Plan because he rejected continued employment.

Finally, the Administrator assured Ahuja that paragraph 8(b) of the Enhanced Plan "has been consistently interpreted and applied to every eligible participant subject to reorganization and offered a position involving relocation."[5]

Ahuja appealed this decision to the Plan Administrative Committee ("PAC") arguing the phrase "with another entity" modified all of the possible dispositions of Ericsson and/or its assets contained in paragraph 8(b), including the word "reorganized." According to Ahuja, Ericsson's reorganization and relocation to Raleigh constituted an "internal" reorganization that rendered paragraph 8(b) inapplicable.

The PAC affirmed the Administrator's denial of benefits, finding, in response to arguments set forth in Ahuja's appeal, nothing in the Enhanced Plan required "another" entity be a "non-Ericsson entity." The PAC determined, based on the plain language of the Plan, the "consolidation of separate and distinct geographically-located offices" constituted a reorganization involving another entity. Accordingly, the PAC denied Ahuja benefits based on: (1) the applicability of paragraph 8(b); (2) the purpose of the Plan, which was to retain Key Employees; and (3) the Administrator's consistent interpretation and application of the Plan to every similarly-situated participant.

Ahuja sued Ericsson, the Enhanced Plan, and the Standard Plan in the United States District

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[5] There is no evidence that Ericsson ever applied the Plan differently.

Court for the District of Maryland under section 1132(a)(1)(B) of ERISA. After a thorough analysis, the district court granted Ericsson's motion for summary judgment and denied Ahuja's cross-motion for summary judgment. (App. 11-29) In making its ruling, the district court found the language in paragraph 8(b) ambiguous and deferred to the Administrator's reasonable interpretation. (App. 19-26.) The court also stated that had it reviewed the case *de novo*, it may have applied a different interpretation of paragraph 8(b), but would have reached *the same result* by (1) deferring to the Plan Administrator's reasonable interpretation of 8(b) *and* (2) because, as a matter of law, paragraph 8(c) precluded Ahuja's recovery.[6] (App. 25-26.)

The Fourth Circuit reversed the district court's judgment. Remanding for entry of judgment in Ahuja's favor, the Court found in its abridged "*de novo*" review that paragraph 8(b) was unambiguous and refused to defer to the Administrator's construction. (App. 1-10.) The Court also failed to acknowledge or address the district court's analysis of paragraph 8(c), and never mentioned the purpose of the Plan. It is this opinion on which Petitioner seeks review from this Court.

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[6] Paragraph 8(c) provides: Change in Job Title. Any changes to the title or duties of a participant's position within Ericsson due to sale, merger, spin-off, transfer or internal reorganization shall not constitute an Involuntary Termination and shall not trigger any Enhanced Severance Benefits under this Plan.

ARGUMENT

I. THE FOURTH CIRCUIT'S CIRCUMVENTION OF *FIRESTONE* DEFERENCE COUNTERMANDS THE CORE FOUNDATION OF TRUST LAW ON WHICH ERISA RESTS.

Congress enacted the Employee Retirement Income Security Act ("ERISA") "'to promote the interests of employees and their beneficiaries in employee benefit plans'" and "'to protect contractually-defined'" benefit rights. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 113 (1989) (quoting *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 90 (1983) and *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 148 (1985)).

This Court has repeatedly refused to interfere with the delicate balance between ERISA's "primary goal of benefiting employees and [its] subsidiary goal of containing pension costs." *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 251, 262 (1993), (quoting *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 515 (1981)).

Grounded in trust law, ERISA's codifications of fiduciary responsibilities also reflect Congress' desire to incorporate equity into the statute. 29 U.S.C. § 1104 ("fiduciary duties"); *see also Firestone*, 489 U.S. at 110 (recognizing that ERISA "abounds with the language and terminology of trust law").

ERISA plan administrators, therefore, like trustees', receive great deference when exercising their discretionary powers. *Firestone*, 489 U.S. at 110. This level of deference is necessary to protect the delicate balance between ERISA's competing policies. *See id.*

The Fourth Circuit's opinion destroys ERISA's foundation. It removes express grants of discretion from administrators and unnecessarily transfers that discretion to federal courts.

A. *Firestone* Requires Full Deference.

Although ERISA authorizes plan participants to sue in federal court to seek benefits under ERISA, ERISA itself does not instruct courts on the proper standard of review. *See* 29 U.S.C. § 1132(a)(1)(B). Consequently, this Court accepted the task of determining the appropriate standard of review for benefit denials under ERISA section 1132(a)(1)(B). *Firestone*, 489 U.S. at 104-05.[7]

Based on legislative history and the plain language of the statute, which "abounds with the language and terminology of trust law[,]" this Court allowed the "principles of trust law" to guide its analysis in determining the appropriate standard of review. *Id.* at 110.

Relying heavily on the Restatement (Second) of Trusts and Scott on Trusts, the Court recognized that trustees' decisions are *generally* reviewed *de novo*. *Id.* at 112. At common law, a review of a trustee's decisions would determine the meaning of trust documents in accordance with the ordinary

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[7] This Court recognizes that standards of review exist to "reflect an accommodation of the respective institutional advantages of trial and appellate courts." *Salve Regina College v. Russell*, 499 U.S. 225, 233 (1991). Even the Fourth Circuit ***claims to*** recognize the critical importance of standards of review. *Evans v. Eaton Corp. Long Term Disability Plan*, 514 F.3d 315, 326 (4th Cir. 2008) ("So standards of review do matter, for in every context they keep judges within the limits of their role and preserve other decisionmakers' functions against judicial intrusion.").

rules of contract construction but without "deferring to either party's interpretation." *Id.*

Conversely, a deferential standard of review is appropriate under the common law of trusts when a trustee exercises discretion expressly granted by the unambiguous terms of the trust instrument. *Id.* at 111. The Court noted, under general trust law principles, courts must defer to trustees' discretionary decisions, if reasonable, when a trustee is "given power to construe *disputed* or *doubtful* terms." *Id.* at 111 (emphasis added).

Hence, the Court announced the proper standard of review for claims brought under section 1132(a)(1)(B) of ERISA:

> A denial of benefits challenged under § 1132(a)(1)(B) is to be reviewed under a *de novo* standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan.

Id. (emphasis added).

Ever since, this standard of review has presumably governed every ERISA section 1132(a)(1)(B) case. As recently as June 2008, this Court has still refused to dilute this standard. *See Metro. Life Ins. Co. v. Glenn*, 128 S. Ct., 2343, 2350-052 (2008), (refusing to impose a less-than-deferential standard of review on an administrator's discretionary decision, even though the administrator was operating under a conflict of interest).

The Fourth Circuit's opinion below, however, avoids this standard of review by authorizing an automatic and selective *de novo* review of an administrator's construction of plan language, correctly or incorrectly, characterized as "unambiguous." In crafting this new standard, the Fourth Circuit grants itself permission to step into the role of administrator any time it disagrees with the administrator's reasoned interpretation of the Plan. This Court must protect *Firestone*'s integrity and prevent the courts of appeal from ignoring this well-established standard of review.

B. Common Law Provides the Framework for Determining Reasonableness.

When plan language gives an administrator discretion, courts must determine whether the administrator abused that discretion. Judge Poser said it best,

> [D]eference is relative to the nature of the issues, including their complexity . . . . The more complex, the greater the range of reasonable resolutions . . . . The more numerous and imponderable the factors bearing on a decision, the harder it will be for a reviewing court to pronounce the decision unreasonable and hence and abuse of discretion.

Call v. Ameritech Mgmt. Pension Plan, 475 F.3d 816, 822-23 (7th Cir. 2007), *cert. denied*, 128 U.S. 2900 (2008).

In accordance with this Court's guidance in *Firestone*, federal courts developed "a federal common law of rights and obligations under ERISA" that includes the framework necessary to

determine the reasonableness of an administrator's interpretation of plan language. *Firestone*, 489 U.S. at 110-11 (quoting *Pilot Life Ins. Co. v. Dedeaux* 481 U.S. 41, 52-57 (1987)).

A reviewing court must "first determine whether an administrator's interpretation is legally correct. *MacLachlan v. ExxonMobil Corp.*, 350 F.3d 472, 481 (5th Cir. 2003) (abrogated on other grounds by *Metropolitan Life Insurance Co. v. Glenn* as recognized in *Crowell v. Shell Oil Co.*, No. 07-20270, 2008 WL 3485331 (5th Cir. Aug. 14, 2008)). Factors in this determination include:

> (1) whether the administrator's construction is uniform;
>
> (2) whether the administrator's interpretation is consistent with a fair reading of the plan; and
>
> (3) any unanticipated costs resulting from different interpretations of the plan.

Id. If the administrator's interpretation is not legally correct, then a court must decide whether the legally incorrect decision "was an abuse of discretion." *Id.* (citing *Wildbur v. ARCO Chemical Co.*, 974 F.2d 631, 645 (5th Cir. 1992), *clarified*, 979 F.2d 1013 (5th Cir. 1992)). Additional factors for this analysis include:

> (1) the internal consistency of the plan,
>
> (2) relevant regulations created by appropriate administrative agencies, and
>
> (3) the factual background of the determination and any inferences of bad faith.

Wildbur, 974 F.2d at 637-38, *clarified* 979 F.2d 1013.

Importantly, the Fifth Circuit in *Wildbur* recognized, "is the fact that an administrator's interpretation incorrect does not alone establish an abuse of discretion." *Id.* at 638 (emphasis added). This deference to even legally incorrect determinations is consistent with *Firestone* because *Firestone* requires deference to an administrator's interpretation of "disputed" terms which can include both ambiguous and unambiguous language. *See Firestone*, 489 U.S. at 111.

For many years, the Fourth Circuit consistently applied the proper standard of review. *See Booth v. Wal-Mart Stores, Inc. Assocs. Health & Welfare Plan*, 201 F.3d 335 (4th Cir. 2000). The *Booth* court correctly recognized it "must defer to the fiduciary" and leave the fiduciary's decision undisturbed as long as the decision is "reasonable, even if the court itself would have reached a different conclusion." *Booth*, 201 F.3d at 341.

To evaluate the reasonableness of an administrator's discretionary decision, the court provided the following "criteria" to assist in the analysis:

(1) the language of the plan;

(2) the purposes and goals of the plan;

(3) the adequacy of the materials considered to make the decision and the degree to which the materials support the decision;

(4) whether the fiduciary's interpretation is consistent with other provisions in the plan and with earlier interpretations of the plan;

(5) whether the decision-making process was reasoned and principled;

(6) whether the decision is consistent with procedural and substantive requirements of ERISA;

(7) any external standard relevant to the exercise of discretion; and

(8) the fiduciary's motives and any conflict of interest it may have.

Id. at 343 (emphasis added); *see also Finley v. Special Agents Mutual Benefit Ass'n*, 957 F.2d 617, 621 (8th Cir. 1992).

The *Booth* and *Finley* courts expressly recognized that an administrator's interpretation of plan language is but *one* factor among several in considering whether an administrator abused its discretion -- the interpretation of plan language about which a court disagrees is ***not*** an invitation to change the standard of review from abuse of discretion to *de novo*.

Ignoring the common law, the Fourth Circuit inexplicably considered only *one* of the *Booth* factors when deciding the administrator abused its discretion -- the plan language. Having disagreed with the administrator's interpretation of paragraph 8(b), the Court characterized, in about four pages of explanation, the language at issue as "unambiguous" and claimed entitlement to review the plan, *de novo* even though the plan clearly and unambiguously gave discretion to the administrator to construe plan terms. The Court also erroneously limited its *de novo* review to only one section of the plan. As described in

Section II.(C) below, the Second, Third, Fifth, and Tenth Circuits have also engaged in similar disregard of *Firestone*'s binding precedent.

The Fourth Circuit established standards intended to circumvent *Firestone* under a strained pretense thereby requiring this Court to exercise its supervisory power to protect *Firestone*'s integrity.

II. THE FOURTH CIRCUIT'S ATTEMPTS TO AVOID DEFERENCE REQUIRE INTERVENTION.

In *Evans v. Eaton Corp. Long Term Disability Plan*, the Fourth Circuit drafted an eloquent opinion expounding on the importance of *Firestone*. 514 F.3d at 326. As explained below, in the years leading up to the *Evans* decision, in a related series of cases, the Fourth Circuit began its subtle journey away from *Firestone* deference. *See Blackshear v. Reliance Standard Life Ins. Co.*, 509 F.3d 634 (4th Cir. 2007); *Colucci v. Agfa Corp. Severance Pay Plan*, 431 F.3d 170, 176 (4th Cir. 2005), *cert. denied*, 547 U.S. 1148 (2006); *Kress v. Good Employers Labor Relations Ass'n*, 391 F.3d 563, 567 (4th Cir. 2004); *Lockhart v. United Mine Workers of Am. 1974 Pension Trust*, 5 F.3d 74, 77-78 (4th Cir. 1993).[8]

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[8] Courts from other circuits have issued similar holdings to those advanced by the Fourth Circuit through its gradual abandonment of *Firestone*. *See, e.g., Baker v. Metro. Life Ins. Co.*, 364 F.3d 624, 629-30 (5th Cir. 2004); *Brockett v. Reed*, 78 Fed. Appx. 148, 150 n.1 (2d Cir. 2003); *In re Unisys Corp. Long-Term Disability Plan ERISA Litig.*, 97 F.3d 710, 715-17 (3d Cir. 1996); *McGee v. Equicor-Equitable HCA Corp.*, 953 F.2d 1192, 1200 (10th Cir. 1992).

With the exception of *Evans*, the Fourth Circuit gradually built its case law such that it created, inch by inch, case by case, a path that led to its opinion below, completely ignoring *Firestone* standards.

A. The Fourth Circuit Claims to Understand and Abide by *Firestone*.

Just a few months before deciding this case, the Fourth Circuit properly applied *Firestone* in *Evans v. Eaton Corp. Long Term Disability Plan*, 514 F.3d at 318.

In *Evans*, the plaintiff sued under section 1132(a)(1)(B) of ERISA after her employer, Eaton Corporation, terminated her disability benefits. *Id.* The district court entered judgment for plaintiff because, although some evidence supported the administrator's termination of benefits, the district court believed more evidence supported a ruling for plaintiff. *Id.* On appeal, the Fourth Circuit applying the abuse of discretion standard of review to the administrator's decision, reversed the district court's judgment. *Id.*

The *Evans* court correctly stated that the "case turn[ed] on a faithful application of the abuse of discretion standard of review." *Id.* Notably, the court recognized that to apply the proper standard of review, it had to understand the specialized role standards of review played in cases brought under section 1132(a)(1)(B). *Id.* at 320-23.

The court stated, although the term 'abuse of discretion' has "different meanings in different legal contexts[,] . . . taken together, the two words [abuse and discretion] convey an unmistakable message: that as a matter of priority as well as

sequence, discretion is first, and review for abuse is only a posterior check on judgment with strays too far from the mark." *Id.* at 322 (emphasis added).

The *Evans* court continued:

> The abuse of discretion standard in ERISA cases protects important values: the plan administrator's greater experience and familiarity with plan terms and provisions; the enhanced prospects of achieving consistent application of those terms and provisions that results [sic]; the desire of those who establish ERISA plans to preserve at least some role in their administration; and the importance of ensuring that funds which are not unlimited go to those who, according to the terms of the plan, are truly deserving.

Id. at 323.

The *Evans* court warned, "the language of discretion in an ERISA plan is a message to courts counseling . . . a healthy measure of judicial restraint." *Id.* Courts must not lose sight of the "delicate balance" between an individual's desire to receive benefits and the "need to protect employees and their beneficiaries as a group from a contraction in the total pool of benefits available." *Id.* While this is an eloquent statement of the law, by Fourth Circuit standards, *Evans* is an isolated case.

B. The Fourth Circuit's "Understanding" of *Firestone* Is Not Reflected in its Jurisprudence.

Notwithstanding its statements in *Evans*, the Fourth Circuit devoted fifteen years to develop case law that permitted the change announced in this case. The Court quietly began the fifteen-year process of issuing opinions, upon which subsequent cases cited, relied, and built, with the result being each case eroding *Firestone* ever so slightly. Having managed to erode *Firestone* without this Court's intervention during this fifteen year period, the Fourth Circuit finally took the bold plunge in this case (and through an unpublished opinion that would draw less attention) and abandoned *Firestone* all the while paying to *Firestone* nothing more than lip-service. While the Fourth Circuit is comfortable citing *Firestone* and its standard of review in its opinions, it fashioned in this case the final step that actually changes *Firestone* by allowing it to condition deference on the court's characterization of plan language as ambiguous or unambiguous -- whichever suits the court's desired result in a particular case.

By way of background, in 1993, before the Fourth Circuit decided *Booth*, it properly applied *Firestone's* deferential analysis. *Lockhart*, 5 F.3d at 77-78 (applying five factors to determine reasonableness of the administrator's interpretation of ambiguous plan language).

The court, however, in *dicta*, opined "if the denial of benefits is 'contrary to the clear language of the [p]lan' . . . the decision will constitute an abuse of discretion." *Id.* at 78 (quoting *de Nobel v.*

Vitro Corp., 885 F.2d 1180, 1188 (4th Cir. 1989) (quoting *Dennard v. Richards Group, Inc.*, 681 F.2d 306, 316 (5th Cir. 1982)).

The Fourth Circuit's reliance on *Dennard*, a pre-*Firestone* decision, combined with its unnecessary *dicta* about unambiguous plan language -- language not implicated under the facts of that case -- was the Fourth Circuit's first step in its journey towards permitting itself *de novo* reviews of plans and its role as advocate rather than deferring reviewer. The unnecessary *dicta* in *Lockhart* was contrary to the court's professed understanding of the importance of allowing administrators to consistently construe the terms of plans entrusted to them. *See Evans*, 514 F.3d at 318.

Eleven years later, the Fourth Circuit, very subtly again chipped away at *Firestone*. *See Kress*, 391 F.3d at 567. Like *Lockhart*, *Kress* involved a suit to recover benefits under section 1132(a)(1)(B). *Id.* at 566. Unlike *Lockhart*, both the district court and the Fourth Circuit agreed the plan language at issue in *Kress* unambiguously excluded the plaintiff from coverage. *Id.*

The Fourth Circuit did not need to defer to the Fund's interpretation of plan language because the court *agreed* with the Fund's construction. *Id.* In explaining this agreement, the *Kress* court unnecessarily noted that "the Fund's discretionary authority is not implicated, *because the terms of the plan itself are clear*." *Id.* (emphasis added).

That statement, in context, is clear: the court agreed with the Fund's denial of benefits. As such, it found no need to conduct further analysis to

determine whether the Fund's proper interpretation was not *also* an abuse of discretion. *See id.* In other words, the court believed the administrator "got it right." *Id.*

One year later, the Fourth Circuit somehow turned *Kress's* statement regarding the implications of discretionary authority into an affirmative obligation to review an administrator's discretionary interpretation of unambiguous language under a *de novo* standard of review rather than the *Firestone*-mandated abuse of discretion standard. *See Colucci*, 431 F.3d at 176. *Colucci* represents a case in which the district court and appellate court disagreed on whether the plan language was ambiguous or unambiguous. *See id.*

In *Colucci*, the district court reversed the plan administrator's denial of benefits because it determined the plan language unambiguously conferred benefits upon the participant. *Id.* at 173. The Fourth Circuit reversed the district court's judgment because, contrary to the district court's ruling, the plan language, according to the Fourth Circuit, was ambiguous and the administrator's interpretation was reasonable. *Id.*

Although ultimately deciding the administrator deserved deference due to the ambiguity of the plan, the court cited *Kress* for the proposition that "[i]nterpretative discretion only allows an administrator to resolve ambiguity." *Id.* at 176 (emphasis added). Recognizing that *Kress* did not limit *Firestone* deference to situations in which

plan language is ambiguous, the court included the word "*see*" before its citation to Kress.[9]

"*See* . . . is used instead of '[no signal] when the proposition is not directly stated by the cited authority . . . [because] there is an inferential step between the authority cited and the proposition it supports." THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. 1.2(a), at 46 (Columbia Law Review Ass'n et al. eds, 18th ed. 2005).

The *Kress* court's statement that discretionary authority was not implicated referred only to the fact that both the district court and the appellate court agreed the language was unambiguous. *Kress*, 391 F.3d at 568. The *Colucci* court took that statement out of context, weaving it into *Firestone* in such a way as to create an exception to *Firestone* deference. *Colucci*, 431 F.3d at 176. According to the *Colucci* court, rather than deferring to an administrator's interpretation of disputed language and determining whether the administrator abused its discretion in construing plan terms, the correct standard of review is to defer to the plan administrator's construction of plan language only

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[9] *Firestone* recognizes administrators may need to exercise discretion and construe "disputed" and "doubtful" terms, not exclusively ambiguous terms. *Firestone*, 489 U.S. at 111. Clearly, as here, there could be a legitimate dispute over an allegedly unambiguous term. That a term is disputed suggests its ambiguity, absent a scenario wherein an administrator interprets something so obvious as a "yes" as a "no," or "black" as "white." Even then, absent an analysis of the plan's purpose, the other plan provisions, the administrative record, and the application of the plan, what might be considered unambiguous language in one section of a plan could be ambiguous when viewed in the context of the entire plan, its purpose, and its application.

if the language is characterized by the court as ambiguous. *Id.* If a court exercising a *de novo* review determines the language is unambiguous, then the administrator's discretion to construe a plan is stripped away and given to the reviewing court instead. *See id.* This is the result the Fourth Circuit warned against in *Evans*. *See Evans*, 515 F.3d at 318.

To soften the blow of its new standard of review for unambiguous language, the *Colucci* court couched the exception in *Firestone* terms:

> if a plan unambiguously provides 20 weeks of compensation as a severance benefit for an employee . . . the administrator *abuses its discretion* by reading the plan to provide 17 weeks of compensation.

Id. at 176 (emphasis added). In reality, the *Colucci* court actually held that, as a matter of law, if it determines a plan's language is unambiguous, the court, not the administrator, will make the benefit eligibility determination. *Id.* The Fourth Circuit's characterization of ambiguity in the language addressed in *Colucci*, however, prohibited the it from applying its newly-created standard of review. *Id.*

Two years later, the Fourth Circuit, applied its *Firestone* exception, under the guise of a *Firestone* standard of review. *Blackshear*, 509 F.3d at 638.

In *Blackshear*, the plain language of the plan at issue did not impose a benefit waiting period. *Id.* at 636. The administrator denied plaintiff's claim for benefits because, even though the plan did not specifically include a waiting period, the plan *intended* to include a waiting period and a "clerical

error" kept the proper language out of the plan. *Id.* at 637. The district court granted summary judgment for the plan because the administrator did not abuse its discretion in relying on the "clerical error clause." *Id.* at 638.

On appeal, the Fourth Circuit reversed. *Id.* at 639. Citing *Colucci*, the court reasoned that "the administrator is not free to alter the terms of the plan or to construe unambiguous terms other than as written." *Id.* (quoting *Colucci*, 431 F.3d at 176). Then, citing *Kress* and again employing the benefits of the signal "*see*," the court noted that an administrator's interpretive discretion applies only to ambiguities in the plan." *Id.* (emphasis in original). Finally, couching its *de novo* review in *Firestone* terms, the court held that "[a]n administrator's discretion never includes the authority 'to read out unambiguous provisions' contained in an ERISA plan, and to do so constitutes an abuse of discretion." *Id.*

C. Other Circuits Share the Fourth Circuit's View of *Firestone* Deference.

Like the Fourth Circuit, the Second, Third, Fifth, and Tenth Circuits also engage in *de novo* review of an administrator's discretionary construction of unambiguous plan language.[10] The

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[10] Unlike the circuits addressed in this section, several circuits properly apply the abuse of discretion standard to unambiguous language. *See, e.g.*, *Jones v. Metro. Life Ins. Co.*, 385 F.3d 654, 661 (6th Cir. 2004) (concluding plan administrator acted arbitrarily when interpreting unambiguous plan language); *Swaback v. Am. Info. Techs. Corp.*, 103 F.3d 535, 540 (7th Cir. 1996) (recognizing that "if fiduciaries or administrators of an ERISA plan controvert the plain meaning of a plan, their actions are arbitrary and

Second Circuit, in *Brockett v. Reed*, employed a *de novo* review rather than deferring to the administrator's construction of plan language. 78 Fed. Appx. 148, 150 n.1 (2d Cir. 2003) (unpublished). The *Brockett* court opined, "[u]nambiguous language . . . 'leaves no room for the exercise of discretion,' and we need not defer to an interpretation that is contrary to the plain language of a plan." *Id.* (quoting *O'Neil v. Ret. Plan for Salaried Employees of RKO Gen., Inc.*, 37 F.3d 55, 59 (2d Cir. 1994)). Unlike the Fourth Circuit, however, the *Brockett* court announced, in a footnote, "Of course, a plan administrator almost certainly abuses its discretion when it renders a decision contrary to the plain language of the plan, so that the fact that our review in such cases is *de novo* makes little practical difference." *Id.* at 150 n.1 (emphasis added).

Likewise, in *Baker v. Metro. Life Ins. Co.*, the Fifth Circuit inexplicably abandoned its original,

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capricious"); *Jantzen v. Pension Plan for Ca. Ironworkers Field Pension Trust*, 935 F.2d 274, at *3 (9th Cir. 1991) ("trustees' interpretation of the Plan was contrary to the Plan's plain meaning and was, therefore, unreasonable and an abuse of the trustees' discretion."). Even the Fifth and Tenth Circuits, at times, apply the appropriate standard of review. *Pitman v. Blue Cross & Blue Shield of Ok.*, 217 F.3d 1291, 1299 (10th Cir. 2000) (holding plan administrator arbitrarily interpreted plan language which unambiguously excluded treatment on which plaintiff based her benefit claim); *Lowry v. Bankers Life & Cas. Ret. Plan*, 865 F.2d 692, 694 (5th Cir. 1989) ("When the trustees' interpretation of a plan is in direct conflict with express language in a plan, this action is *a very strong* [but not mandatory] indication of arbitrary and capricious behavior.") (quoting *Dennard v. Richards Group*, 681 F.2d 306, 313 (5th Cir. 1982)).

proper application of *Firestone* deference recognized in *Wildbur v. ARCO Chem. Co.*, and applied a *de novo* review rather than an abuse of discretion standard to evaluate the administrator's construction of plan language. 364 F.3d at 629-30.

The Third and Tenth Circuits have also engaged in analysis similar to those employed by the Second and Fifth Circuits. *See, e.g., In re Unisys Corp. Long-Term Disability Plan ERISA Litig.*, 97 F.3d at 715-17 (applying a *de novo* standard of review, declaring unambiguous plan language the district court found ambiguous in its deference to plan administrator's interpretation); *McGee*, 953 F.2d at 1200 (reviewing "the terms of the health agreement and [Defendant's] denial of benefits *de novo*" because the contract language was not ambiguous).

The clear point overlooked by courts prepared to remove from the administrator any deference is this: that courts may find one provision unambiguous does not remove from the administrator all discretion for it is the administrator that understands and knows the purpose, the plan's history, the consistency of the plan's application, and the remaining provisions of the plan. By viewing only one provision in a vacuum and ignoring other provisions and the express purpose of the plan, the Fourth Circuit removed all authority, not only discretionary authority, from the administrator.

How can courts, on the one hand, afford deference to the interpretations of administrators, when the courts deem the interpretation "wrong" and, on the other hand, remove all deference if it characterizes one provision as unambiguous.

Wildbur, 974 F.2d at 645, *clarified*, 979 F.2d 1013 ("the fact that an administrator's interpretation is not the correct one does not in itself establish that the administrator abused his discretion)." Wrong is wrong regardless of the reason. Under *Firestone*, wrong still requires deference.

D. Applying the *De Novo* Standard Improperly Changes the Outcome of Close Cases.

The Fourth Circuit's opinion in this case exemplifies the effect of the faulty legal analysis contained in footnote 1 in *Brockett*. 78 Fed. Appx. at 150 n.1. ("Of course, a plan administrator almost certainly abuses its discretion when it renders a decision contrary to the plain language of the plan, so that the fact that our review in such cases is *de novo* makes little practical difference.") (emphasis added). The biggest problem with that statement is that "almost certainly" does not mean always and that all factors must be considered in an abuse of discretion analysis -- not just the plan language. A court's disagreement with the interpretation of one section of a plan does not mean the administrator abused its discretion.

As Judge Posner opined in *Call*, the line between ambiguity and clarity is indistinct. 475 F.3d at 822-23.

For example, in *Blackshear*, like the *Brockett* court predicted, the result would likely have been the same under a *de novo* or abuse-of-discretion standard of review because the administrator refused to award benefits after admitting the plan language clearly supported an award in participant's favor. *See Blackshear*, 506 F.3d at 634 (awarding benefits to the participant because

the plan language did not contain an eligibility waiting period even though the administrator *intended* to include that clause in the plan).

In this case, however, there is a real, meaningful difference between *de novo* and abuse of discretion review. The district court analyzed each of the eight *Booth* factors and determined the administrator's decision was reasonable, finding the administrator's interpretation was (1) consistent with the plan language; (2) consistent with the goals of the plan to retain key employees; (3) sufficient in light of the administrative record; (4) consistent with other interpretations of the plan; (5) reasoned and principled as explained in the written correspondence; (6) consistent with ERISA procedure; (7) not reliant on an external standard; and (8) not motivated by a conflict of interest. (App. 17-26).

Assuming arguendo the Fourth Circuit's interpretation of paragraph 8(b) is correct, the district court's *Booth* analysis demonstrates, notwithstanding the plan's language, the administrator's denial was reasonable under the circumstances and should not be disturbed on appeal. In other words, this is the case where the difference between *de novo* and abuse of discretion *would* matter. This is the case that reveals the danger in permitting a court to avoid *Firestone* when it disagrees with an administrator by simply declaring one section of the plan "unambiguous."[11]

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[11] The Fourth Circuit's desire to fill the administrator's role was so great that it actually provided its own definitions in the section it reviewed -- a role wholly improper for the courts.

The uniform application of standards of review for fiduciaries' discretionary acts is at risk. This Court should exercise its supervisory power to clarify that plan language is only a *factor* in an abuse of discretion standard of review, not a reason to engage in a *de novo* review.

III. THE FOURTH CIRCUIT'S OPINION IS A DEPARTURE FROM ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS.

This Court should grant Petitioner's writ of certiorari to avoid the dangerous precedent the Fourth Circuit set in deciding this case. First, the Fourth Circuit ignored *Firestone* and applied a *de novo* standard of review to an administrator's discretionary construction of plan terms. Further, to find the plan language unambiguous to trigger its *de novo* review, the court stretched the plan language to the point of breaking. Finally, the Fourth Circuit's *de novo* review did not encompass each factor relevant to a review for abuse of discretion, or all of the plan's language. This Court should not reward the Fourth Circuit's distortion of applicable legal principles to achieve its desired results at the expense of ERISA, *Firestone*, and proper application of critical standards of review.

A. The Fourth Circuit Applied Its Newly-Created "*De Novo* for Unambiguous Language" Standard in Deciding this Case.

Despite the Fourth's Circuit's apparent understanding of the abuse of discretion standard, the court turned that standard on its head in this

case. The Fourth Circuit decided to apply the standard of review it created in *Colucci,* but was unable to apply to the facts of that case.

In pronouncing the applicable standard of review, the Fourth Circuit stated:

> [B]ecause Ericsson reserved full discretion to interpret the terms of its plans and to adjudicate benefits claims, we would generally review its denial of benefits for an abuse of discretion. . . . However, in the context of an interpretation of a plan's language, we afford this deference only if the language at issue is ambiguous. . . . Where, in contrast, the plan's language is clear and unambiguous, a plan administrator must construe the language as written, and we owe no deference to contrary constructions.

(App. 5-6.) With this statement, the standard of review in the Fourth Circuit section 1132(a)(1)(B) actions changed forever: review the plan language *de novo.* If the court disagrees with the administrator, declare the language at issue as unambiguous and enter judgment for the participant without reviewing any additional *Booth* factors.

Interestingly, this statement is in direct contradiction to the Fourth Circuit's position in *Carolina Care Plan Inc. v. McKenzie* in 2006. 467 F.3d 383, 389 (4th Cir. 2006), *cert. dismissed,* 128 S. Ct. 6 (2007). In *McKenzie,* the district court and the Fourth Circuit agreed the language at issue was ambiguous. *Id.* at 390. The Court, however, did not completely defer to the administrator's interpretation because, according to the court, the

administrator's conflict of interest required a less deferential review. *Id.* Ultimately, the *McKenzie* court held the administrator abused its discretion in interpreting ambiguous plan language. *Id.*

During its analysis, the Fourth Circuit proclaimed, "When an administrator applies *unambiguous* plan terms to the facts of a particular claim, courts will defer to every judgment the administrator makes that is supported by substantial evidence and a reasoned decisionmaking process." *Id.* (emphasis added).

This leads to a curious result: when language is ambiguous, as in *McKenzie*, the court avoids *Firestone* deference by escalating a conflict of interest to minimize the standard of deference; when the situation is reversed, as in this case, the Fourth Circuit abandons its deference to language it characterizes as unambiguous for a *de novo* review so that it can, once again, substitute its own opinion for that of the administrator. The Fourth Circuit cannot be allowed to manipulate the standards to further its own purpose at the expense of altering the delicate balance between ERISA administrators and participants. This court should exercise its supervisory powers to correct these errors.

Likewise curious is the Fourth Circuit's declaration that even if language is unambiguous, the court will review other factors (substantial evidence and a reasoned decision-making process) if the unambiguous language *supports* the administrator's denial of benefits. *Id.* The Fourth Circuit will only reverse the plan administrator without review of any other factors when it deems

plan language unambiguous AND contrary to the administrator's denial of benefits. The Fourth Circuit wholly failed to comply with this standard here.

B. The Fourth Circuit Improperly Declared Paragraph 8(b) Unambiguous.

This case is about the meaning of the following language:

> Sale or Merger of Ericsson. Should *all or any part of Ericsson or its assets or business* to which a participant is assigned be *sold, assigned, transferred, spun-off, reorganized, or merged with another entity*, the participant will not be eligible for Enhanced Severance Benefits under this Plan if he or she is offered continuing employment with *such entity* regardless of whether the participant accepts the offer of employment . . . .

After a thorough analysis, the district court found the language ambiguous because it was susceptible to several different meanings and hopelessly unclear.[12] (App. 17-26.) According to the court

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[12] The district court's specific criticisms of paragraph 8(b) include:

- "There's probably a very special place in hell reserved for the person who wrote this paragraph."
- "It is not a crystal clear model of clarity."
- "This was a clause that created considerable and reasonable debate about its meaning because it is subject to some varying interpretations."
- "As inartfully worded as this clause may be . . . ."
- "The drafting leaves a good bit to be desired."

below, the administrator, the administrative committee, ***and*** the district court all got it wrong because "Paragraph 8(b) is unambiguous." (App. 9.) Of note, it required the Fourth Circuit over three pages to "explain" why the language is unambiguous and required it to supplant the plan with its own definitions of undefined terms. (App. 6-9.)

In its ensuing *de novo* review of the language of paragraph 8(b), the court held paragraph 8(b): (1) applied only if Ericsson reorganized with another, non-Ericsson entity, and (2) did not preclude Ahuja from obtaining enhanced benefits because the Maryland and Raleigh offices were not "entities" under the plain meaning of the term. (App. 6-9.)[13]

- " . . . clearly a clause as to which reasonable persons could differ."
- "Awkwardly-worded language used in the plan which could cause reasonable persons to have a very different view."

(App. 17-26.)

[13] The Fourth Circuit created additional problems with its second holding because the record is devoid of evidence relating to the legal status of Ericsson IPI's Maryland and Raleigh offices. For example, there is no evidence as to (1) whether the two offices are separate for tax purposes, (2) the management structure of the offices, (3) the organizational charts, (4) the reporting schemes, (5) the business plans or (6) any other information regarding the "separateness" of the two entities. It seems incredible that the Fourth Circuit, in a *de novo* review, could find that Ericsson's Maryland and Raleigh offices were not "entities" as a matter of law without a shred of evidence regarding the "legal existence" of the two offices.

Rather than grant benefits to Ahuja, the proper remedy was to remand to the plan administrator to supplement the record with evidence regarding the Maryland and Raleigh offices

The Fourth Circuit's holding is nonsensical. It requires the administrator to read words into paragraph 8(b) that simply are not there[14] and substitute the legal definition of the word "entity" despite the administrator's discretionary decision to apply the common, ordinary meaning.

The Fourth Circuit, like the district court, should have applied the *Firestone* abuse of discretion standard of review and analyzed the administrator's decision within the confines of the *Booth* reasonableness factors. Rather than follow *Firestone* and *Booth*, the Fourth Circuit improperly applied its own "*de novo* if unambiguous" exception.

The Fourth Circuit's opinion was so outside the course of accepted judicial conduct that this Court

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because the administrator must now apply the Fourth Circuit's definition of "entity" in place of its own. *See Quesinberry v. Life Ins. Co. of N. Am.*, 987 F.2d 1017, 1026-27 (4th Cir. 1993) (recognizing that a reviewing court may consider evidence outside the administrative record if necessary to adjudicate the claim).

[14] The Fourth Circuit held that the words "with another entity" in paragraph 8(b) modified the words "sold, assigned, transferred, spun-off, and reorganized." (App. 7). According to the court's ruling, the contract would read: sold with another entity, assigned with another entity, transferred with another entity, spun-off with another entity, and reorganized with another entity. These phases make no sense. To be coherent, the contract would, instead, have to read: sold *to* another entity, assigned *to* another entity, transferred *to* another entity, spun-off *into* another entity, and reorganized *to form* another entity. By altering the terms of paragraph 8(b) to find it unambiguous, the Fourth Circuit clearly went beyond the bounds of the accepted and usual course of judicial proceedings as to warrant an exercise of this Court's supervisory power.

should exercise its supervisory powers to ensure the *Firestone* standard of review is consistently applied throughout all federal courts.

C. The Fourth Circuit's *De Novo* Review Does Not Comply With the Law.

A *de novo* review provides the reviewing court with authority "identical to that of the court whose ruling is under scrutiny." Richard H. Maloy, *Standards of Review - Just a Tip of the Icicle*, 77 U. DET. MERCY L. REV. 603, 611 (1999-2000). The appellate court's role is not only to determine whether the trial court erred, but also to ensure "the proper party prevail[s]." *Id.*

Appellate courts "are structurally suited to the collaborative juridical process that promotes decisional accuracy." *Salve Regina College*, 499 U.S. at 232. Proper *de novo* review is critical because it "best serves the dual goals of doctrinal coherence and economy of judicial administration." *Id.* at 231. Indeed, it is the reviewing court's duty to "comb the record" and ensure "the district court correctly applied the substantive law." *Id.* (citing *Umlic-Nine Corp. v. Lipan Springs Dev. Corp.*, 168 F.3d 1173, 1176 (10th Cir. 1999).

De novo review "necessarily entails a careful consideration of the district court's legal analysis." *Salve Regina College*, 499 U.S. at 232. An efficient and sensitive appellate court at least will naturally consider this analysis in undertaking its review. *Id.* Along this vein, "when the judgment of a district court is correct, it may be affirmed for reasons not given by the court and not advanced to it." *Pitts v. Am. Sec. Life. Ins. Co.*, 931 F.2d 351, 357 (5th Cir. 1991) (quoting *Laird v. Shell Oil Co.*,

770 F.2d 508, 511 (5th Cir. 1985)). In other words, under a *de novo* standard of review, a reviewing court must affirm the district court's judgment on any ground that will support affirmance. *Id.*

As described above, the Fourth Circuit's finding that paragraph 8(b) is unambiguous is inconsistent with a *de novo* standard of review. *See* Section III (B), *supra*. Further, and even more important, the Fourth Circuit did not address one of the reasons for the district court's denial of Ahuja's cross-motion for summary judgment. Specifically, the district court ruled:

> I also believe that under the provisions of Paragraph 8(C) of the plan that he would also be disqualified, because what happened in this case was his duties as an employee of Ericsson were changed in the sense that his duty station was changed from Rockville Maryland to North Carolina, and that was clearly the result of an internal reorganization, and the severance of this employment with the company was the result of him declining to accept the transfer, and this is not what the severance plan was designed to protect against.

(App. 26.)[15] In other words, the district court ruled that Ahuja's cross-motion for summary judgment

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[15] Paragraph 8(C) of the Enhanced Severance Plan states:

> Change in Job Title. Any changes to the title or duties of a participant's position within Ericsson due to sale, merger, spin-off, transfer or *internal reorganization* shall not constitute an Involuntary

failed because the plain language of paragraph 8(c) precluded him from recovering benefits under the Enhanced Severance Plan as a matter of law. (App. 26.)

In addition to applying the wrong standard of review in this case (*de novo*), the Fourth Circuit also failed to conduct a proper *de novo* review. Under a *de novo* standard of review, the Fourth Circuit should have either explained why paragraph 8(c) does not preclude Ahuja's benefits *or* affirmed the district court's judgment, based on 8(c) or any other applicable ground. *Mansker v. TMG Life Ins. Co.*, 54 F.3d 1322, 1328 (8th Cir. 1995). The Fourth Circuit's failure to conduct a complete *de novo* review is so far outside the normal course of judicial proceedings that this Court should exercise its supervisory power to correct this error.

In this case, the district court got it right when it found Ahuja's benefits barred by the plain language of paragraph 8(c). Recognizing coverage is barred, the Fourth Circuit, in its *de novo* review, should have affirmed the district court's decision. *See Mansker*, 54 F.3d at 1328 ("where an ERISA plan gives a plan administrator or fiduciary discretion to decide certain issues, the fact that the administrator or fiduciary fails to address or decide those issues does not exempt those issues from *de novo* review by the district court on summary judgment").

Termination and shall not trigger any Enhanced Severance Benefits under this Plan.

This Court should exercise its supervisory powers to safeguard the uniform application of *Firestone's* abuse of discretion standard of review throughout the circuits and to correct the Fourth Circuit's judgment, which is far outside the acceptable bounds of reasoned jurisprudence.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari.

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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 07-1196

RITESH AHUJA,

Plaintiff-Appellant,

v.

ERICSSON, INCORPORATED; ERICSSON STANDARD SEVERANCE PAY PLAN; ERICSSON TOP CONTRIBUTOR ENHANCED SEVERANCE PAY PLAN OF 2004,

Defendants-Appellees.

Appeal from the United States District Court
for the District of Maryland, at Greenbelt.
Roger W. Titus, District Judge. (8:05-cv-03423-RWT)

Argued: March 20, 2008 Decided: May 12, 2008

Before GREGORY and SHEDD, Circuit Judges, and WILLIAM L. OSTEEN, JR., United States District Judge for the Middle District of North Carolina, sitting by designation.

Affirmed in part, reversed in part, and remanded by unpublished opinion. Judge Shedd wrote the opinion, in which Judge Gregory and Judge Osteen joined.

ARGUED: Marc Jonathan Smith, SMITH, LEASE & GOLDSTEIN, L.L.C., Rockville, Maryland, for Appellant. Holly H. Williamson, AKIN, GUMP, STRAUSS, HAUER & FELD, L.L.P., Houston, Texas, for Appellees. **ON BRIEF:** Simon J. Garfield, AKIN, GUMP, STRAUSS, HAUER & FELD, L.L.P., Houston, Texas, for Appellees.

Unpublished opinions are not binding precedent in this circuit.

SHEDD, Circuit Judge:

In this ERISA[1] benefits action, Ritesh Ahuja appeals from the district court's grant of summary judgment in favor of Ericsson, Inc. ("Ericsson"); Ericsson Standard Severance Pay Plan (the "Standard Plan"); and Ericsson Top Contributor Enhanced Severance Pay Plan of 2004 (the "Enhanced Plan"). As set forth below, we affirm in part, reverse in part, and remand.

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[1] Employee Retirement Income Security Act, 29 U.S.C. § 1001 *et seq.*

I

For approximately eight years, Ahuja was employed by Ericsson and its predecessors, working for Ericsson's wholly-owned subsidiary Ericsson IP Infrastructure ("Ericsson IPI") in its Rockville, Maryland, office. During his employment with Ericsson IPI, Ahuja held various high-level technical positions. As an employee of Ericsson IPI, Ahuja participated in the Standard Plan, which provided severance compensation, subject to certain conditions, if he experienced a qualifying employment loss. In addition, as an employee with particular technical knowledge, Ahuja participated in the Enhanced Plan. This plan essentially served as a retention tool used to provide Ericsson's key employees with an incentive to remain with Ericsson. Under the terms of the Enhanced Plan, a participant would be entitled to a severance payment equal to six months of his base salary in the event of a covered employment loss. As relevant here, a covered employment loss is defined as an involuntary termination "due to layoff or reduction-in-force." J.A. 70. The Enhanced Plan includes the following provision:

> *Sale or Merger of Ericsson.* Should all or any part of Ericsson or its assets or business to which a participant is assigned be sold, assigned, transferred, spun-off, reorganized, or merged with another entity, the participant will not be eligible for Enhanced Severance Benefits under this Plan if he or she is offered continuing employment with such entity regardless of whether the participant

> accepts the offer of employment and regardless of whether such offer is on comparable terms and conditions as the employee's current employment.

J.A. 72 ("Paragraph 8b").

In early 2005, Ericsson IPI closed its Rockville office and consolidated its operations in its Raleigh, North Carolina, location. Ericsson IPI offered Ahuja continued employment at its Raleigh office, which he declined. As a result, Ericsson IPI terminated Ahuja's employment, effective June 17, 2005. Ahuja then filed a claim for severance benefits, which the plan administrator denied, citing Paragraph 8b. Ahuja appealed this decision to Ericsson's Plan Administrative Committee (the "Committee"), which again denied Ahuja's claim. The Committee concluded that the exclusions of Paragraph 8b encompass a consolidation of two geographically distinct Ericsson offices because such a consolidation is a "reorganization" with another entity. The Committee took the position that a geographically distinct office qualifies as "another entity" by noting that nothing in Paragraph 8b requires that the entity be a "non-Ericsson entity." J.A. 151.[2]

Ahuja filed suit under ERISA challenging the Committee's denial of benefits. The district court granted Ericsson's motion for summary judgment,

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[2] The Committee expressly declined to rule on any claim for benefits under the Standard Plan, noting that Ahuja had not filed a claim for these benefits.

finding that the Committee had acted within its discretion in denying Ahuja's claim pursuant to paragraph 8b. The district court also rejected Ahuja's claim for benefits under the Standard Plan, concluding that he had not filed a claim for these benefits with Ericsson.

Ahuja now appeals. There are no disputed material facts, and we review *de novo* the district court's grant of summary judgment based on its legal conclusions. *Garofolo v. Donald B. Heslep Assocs., Inc.*, 405 F.3d 194, 198 (4th Cir. 2005). Additionally, because Ericsson reserved full discretion to interpret the terms of its plans and to adjudicate benefits claims, we would generally review its denial of benefits for an abuse of discretion. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 111 (1989).[3] Under this standard, a plan administrator's decision "will not be disturbed if it is reasonable, even if [the] court would have come to a different conclusion independently." *Ellis v. Metropolitan Life Ins. Co.*, 126 F.3d 228, 232 (4th Cir. 1997). However, in the context of an interpretation of a plan's language, we afford this deference only if the language at issue is ambiguous. *Kress v. Food Employers Labor Relations Ass'n.*, 391 F.3d 563, 569 (4th Cir. 2004). Where, in contrast, the

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[3] Although Ericsson is both the sponsor and administrator of its benefits plans, any conflict of interest it may have does not rise to the level necessary to reduce the deference we owe its determinations. *Colucci v. AGFA Corp. Severance Pay Plan*, 431 F.3d 170, 179 (4th Cir. 2005).

plan's language is clear and unambiguous, a plan administrator must construe the language as written, and we owe no deference to contrary constructions. *Colucci,* 431 F.3d at 176; *Lockhart v. United Mine Workers of America 1974 Pension Trust,* 5 F.3d 74, 78 (4th Cir. 1993).

II

In this case, the principal issue before us is whether we must defer to Ericsson's construction of Paragraph 8b as excluding Ahuja's claim for Enhanced Plan severance benefits. As already noted, this paragraph provides:

> *Sale or Merger of Ericsson.* Should all or any part of Ericsson or its assets or business to which a participant is assigned be sold, assigned, transferred, spun-off, reorganized, or merged with another entity, the participant will not be eligible for Enhanced Severance Benefits under this Plan if he or she is offered continuing employment with such entity regardless of whether the participant accepts the offer of employment and regardless of whether such offer is on comparable terms and conditions as the employee's current employment.

J.A. 72. Ericsson contends that this paragraph excludes Ahuja's benefits claim because the consolidation of its geographically distinct offices constitutes a reorganization. Ericsson offers two interpretations of Paragraph 8b to support its contentions.

First, Ericsson maintains that nothing in Paragraph 8b requires that the reorganization of Ericsson be with another entity and that the paragraph therefore covers internal reorganizations. In making this argument, Ericsson asserts that the phrase "with another entity" modifies only the immediately preceding term "merged" and not the prior term "reorganized." We find Ericsson's position unpersuasive.

We have long recognized that the meaning of a term cannot be determined in isolation but that the term must be read in the context in which it is used. *See, e.g., Pinney v. Nokia, Inc.*, 402 F.3d 430, 454 (4th Cir. 2005). In context, the reorganization referred to by Paragraph 8b clearly is a reorganization with another entity. All of the terms surrounding "reorganized" require the participation of another entity: "sold," "assigned," "transferred," "spun-off," "merged." Further, the title of Paragraph 8b refers to the interaction of Ericsson and another entity: "Sale or Merger of Ericsson." Finally, the later reference in Paragraph 8b to continuing employment "with such entity" assumes the presence of another entity earlier in the paragraph; otherwise, the later reference would be devoid of meaning. Thus, within the context of Paragraph 8b, "reorganized" can mean only reorganized with another entity.

Second, Ericsson asserts that even if Paragraph 8b requires the presence of another entity, a geographically distinct office of Ericsson itself constitutes "another entity." This argument likewise fails.

Because "entity" is undefined in the plan, it must be accorded its plain and ordinary meaning. *Bailey v. Blue Cross & Blue Shield of Va.*, 67 F.3d 53, 57 (4th Cir. 1995). In addition, as noted earlier, we must examine the term in the context in which it is used. As Ahuja points out, both parties agree that an entity must have an "independent and separate existence." J.A. 46. Furthermore, in the legal context, an entity is "an organization (such as a business or a governmental unit) that has a legal identity apart from its members." Black's Law Dictionary (8th ed. 2004). The plain meaning of "entity," then, requires a discrete and independent organization with its own identity. While Ericsson IPI qualifies as an entity under this definition, a particular office of Ericsson IPI does not.

The context in which "entity" is used lends support to this meaning. Paragraph 8b uses the terms "sold," "assigned," "transferred," "spun-off," "reorganized," and "merged," and these terms are contained within a paragraph entitled "Sale or Merger of *Ericsson*" (emphasis added). Thus, the entire thrust of Paragraph 8b is directed toward a combination of "Ericsson" and "another entity" – not Ericsson and itself.[4]

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[4] We note that Ericsson's proposed definition of "entity" as embracing a geographically distinct office of Ericsson IPI would lead to arbitrary interpretations. For example, at argument Ericsson contended that two Ericsson IPI offices which were directly across the street from each other would not be separate entities. Yet, under Ericsson's own definition, these

(Continued on following page)

We therefore conclude that Paragraph 8b is unambiguous and does not embrace an internal reorganization of two Ericsson IPI locations. Accordingly, Ericsson retained no deference to interpret the paragraph's terms, and it erred when it relied on Paragraph 8b to deny Ahuja's claim for severance benefits.

III

Lastly, we turn to two secondary issues. First, Ahuja claims the district court erred in rejecting his claim for benefits under the Standard Plan. However, we agree with the district court that Ahuja may not raise this claim because he failed to file a claim for these benefits with Ericsson and to pursue his administrative remedies under the plan. *See Gayle v. United Parcel Service,* 401 F.3d 222, 226 (4th Cir. 2005). Second, Ahuja asserts that he is entitled to recover his attorney's fees pursuant to 29 U.S.C. § 1132(g). Because an award of attorney's fees under ERISA is committed to the discretion of the district court and may require certain factual findings, *see Carolina Care Plan, Inc. v. McKenzie,* 467 F.3d 383 (4th Cir. 2006), we leave this issue for the district court to consider on remand.

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geographically distinct offices would seemingly constitute different entities.

IV

In accordance with the foregoing, we affirm the judgment entered below as to Ahuja's claims under the Standard Plan, reverse the judgment and remand for entry of judgment in favor of Ahuja as to his claims under the Enhanced Plan, and remand for further proceedings consistent with this opinion.

AFFIRMED IN PART,
REVERSED IN PART,
AND REMANDED.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

RITESH AHUJA,	*	
Plaintiff	*	
	*	Case Number:
v.	*	05cv3423 RWT
ERICSSON, INC., et. al,	*	
	*	
Defendants	*	

ORDER OF COURT

Upon consideration of Defendants' Motion for Summary Judgment [Paper No. 29], and Plaintiff's Cross-Motion for Summary Judgment [Paper No. 33], the oppositions and replies thereto, and arguments of counsel presented at the hearing conducted before the undersigned on February 5, 2007, and for the reasons stated on the record, it is this 5th day of February, 2007, by the United States District Court for the District of Maryland,

ORDERED, that Defendants' Motion for Summary Judgment [Paper No. 29] is **GRANTED**; and it is further

ORDERED, that Plaintiff's Cross-Motion for Summary Judgment [Paper No. 33] is **DENIED**; and it is further

ORDERED, that judgment for costs is entered in favor of the Defendants; and it is further

ORDERED, that the Clerk of the Court **CLOSE** the case.

/s/
ROGER W. TITUS
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MARYLAND

RITESH AHUJA, Plaintiff	:	
vs.	:	Civil Action: RWT-05-3423
ERICSSON, INC. Defendant.	:	

Monday, February 5, 2007
Greenbelt, Maryland

The above-entitled action came on for a Motions Hearing Proceeding before the HONORABLE ROGER W. TITUS, United States District Court Judge, in courtroom 2A, commencing at 10:05 a.m.

THIS TRANSCRIPT REPRESENTS THE PRODUCT OF AN OFFICIAL REPORTER, ENGAGED BY THE COURT, WHO HAS PERSONALLY CERTIFIED THAT IT REPRESENTS THE RULING BY JUDGE TITUS AS RECORDED AND REQUESTED BY COUNSEL.

APPEARANCES:

On behalf of the Plaintiff:

MARC J. SMITH, Esquire

On behalf of the Defendant:

HOLLY H. WILLIAMSON, Esquire
TARA HITTLEMAN, Esquire

Tracy Rae Dunlap, RPR, CRR (301) 344-3912
Official Court Reporter

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[3] THE COURT: Okay. On December 22, 2005, the plaintiff, Ritesh Ahuja, filed suit in this court against Ericsson, Inc., the Ericsson Standard Severance Pay Plan, and the Ericsson Top Contributor/Top Contributor Severance Pay Plan of 2004.

The complaint alleges that he was a former employee of Ericsson, Inc., a Delaware corporation, and that he had been employed by Ericsson IP Infrastructure, Inc. for eight years in various high level technical positions, mostly – most recently, for purposes of this case, as a systems architect at the company's Rockville, Maryland offices.

As an employee of an Ericsson entity, he was eligible to participate in Erickson's Standard Severance Plan and, as his employment became more significant to the company, he was allowed to participate in what's called, "The Enhanced Severance Plan." The Enhanced Severance Plan was designed to provide for the retention of employees – especially key employees – during periods of turbulence within the industry where it was important to the company to retain employees of the caliber of the plaintiff. The plan provided for, as one might expect from its name,

enhanced severance benefits which would presumably have the desired effect of not making incumbent employees [4] start to look around when they saw turbulence in the industry but, rather, remain with the company with the assurance that if they were laid off, they would have a substantially greater benefit; that would make the risk of staying with the company not as high as would otherwise potentially be the case if they were to only get the standard severance benefit.

The severance plan had a exclusion which is contained in Paragraph 8(b), and that exclusion – I'll read the whole thing into the record – provided as follows. The title of this subsection is Sell or Merger of Ericsson. It then provides, "should all or part of Ericsson or its assets or business to which a participant is assigned be sold, assigned, transferred, spun off, reorganized, or merged with another entity, the participant will not be eligible for enhanced severance benefits. Under this plan, if he or she is offered continued employment with such entity, regardless of whether the participant accepts the offer of employment, and regardless of whether such offer on comparable terms and conditions as the employee's current employment."

In March of 2005, the plaintiff learned that Ericsson was contemplating closing its Rockville, Maryland office and relocating and consolidating its [5] operations in Raleigh, North Carolina where there was another office of the same Ericsson unit. His fears were realized when, on May 2nd 2005, he

received a letter from the Ericsson director of human resources confirming the relocation of the Rockville office and its consolidation with the existing office in Raleigh, North Carolina.

The plaintiff was advised by Mr. Moon of his eligibility for payments under the Standard Severance Plan but was advised that he would not be entitled to benefits under the enhanced severance plan. The plaintiff declined to sign the May 2nd 2005 letter, and on May 17, 2005 he received a letter from Ericsson confirming his impending lay off and separation from the company.

He continued to work and report to work at his duty station in Rockville, Maryland. Then on June 16, 2005, he received a release and severance agreement from Ericsson which would have provided him with the standard severance plan payments in exchange for a general release of claims which would include the releasing of any claim under the enhanced severance plan. He declined to sign that release and severance agreement, and he was then laid off effective June 17 of 2005.

[6] The plaintiff then made an initial claim for benefits under the enhanced severance plan, and the matter then proceeded through the review processes internal to Ericsson, including review by the plan administrator.

The plaintiff pursued internal appeals of the denial of benefits under the enhanced severance plan, and on November 8, 2000 he was sent a letter from

Ericsson that, in detail, recited the history of the claim, and finally denied his application for enhanced severance benefits. Shortly thereafter, as was his right, the plaintiff initiated suit against Ericsson and the two plans in this court.

An answer was filed by the defendant, Ericsson. The matter then proceeded through discovery, and both parties have moved for summary judgment and have submitted well drafted memoranda in support of their respective positions. I have also heard and benefitted from the argument of counsel today.

The matter comes before the court on a – on motions for summary judgment. This is one of those cases in which it's rather obvious that there is no genuine dispute as to any material facts, and someone in this case is entitled to judgment as a matter of law as provided in Rule 56.

[7] Preliminarily, I would note that the matter before the court is not only governed by the all too familiar summary judgment standard, but this case is also governed by the ERISA abuse discretion standard of review. That standard was discussed in great detail by Judge Paul Niemeyer of the United States Court of Appeals for the Fourth Circuit in Booth versus Wal-Mart, a case decided in 2000. That's reported at 201 F. 3d, 335.

In that opinion, Judge Niemeyer reviewed at length the whole question of the degree to which deference is required to be made if at all to plan administrators. He first observed that the review of a

decision of this type is ordinarily a matter that's reviewed de novo but observed, as has been observed many times, that when a plan by its terms confers discretion on a fiduciary, and the fiduciary acts within the scope of the conferred discretion, we defer to the fiduciary in accordance with well settled principles of trust law. Where discretion is conferred upon the trustee with respect to the exercise of a power, its exercise is not subject to control by the court except to prevent an abuse by the trustee of his discretion. Thus, a trustee's discretionary decision will not be disturbed if reasonable, even if the court [8] would have reached a different conclusion.

Judge Niemeyer then discussed at length decisions that have compared and contrasted a review standards, utilizing an arbitrary and a capricious standard on the one hand, with an abuse of discretion standard on the other and concluded that the two standards were not identical and that the abuse of discretion standard would provide for more deference than would the abuse of discretion. The arbitrary and capricious standard would provide less review by a court or less search and review than would the search and discretion standard. I think the better way to say it is that the arbitrary and capricious standard is more deferential to the fiduciary than is an abuse of discretion standard.

He then reviewed the various factors that should be considered by a court when applying abuse of discretion review, analyzed various authorities, and then observed that when one combines these various

criteria for determining the reasonableness of fiduciary's discretionary decision, he concluded for the court that a court may consider but is not limited to such factors as: 1. The language of the plan; the purposes and goals of the plan; the adequacy of the materials considered to make the decision; and the [9] degree to which they support it, whether the fiduciary's interpretation was consistent with other provisions in the plan and with earlier interpretations of the plan, whether the decision making process was reasoned and principled, whether the decision was consistent with the procedural and substantive requirements of ERISA, any external standard relevant to the exercise of discretion and finally, the fiduciary's motives and any conflict of interest it may have. Those are the matters to be considered in applying the abuse of discretion standard in this particular case.

In this case the administrator was only asked to rule on the question of entitlement under the enhanced severance plan, and the question of the entitlement of the plaintiff to benefits under the standard severance plan never arose by virtue of the fact that he declined to sign the release and severance agreement which would have, in turn, triggered waiver of his rights under the enhanced severance plan. So there was never any formal claim presented to the claims administrator for benefits under the standard plan. The only matter that was reviewed by the plan administrator was the one seeking benefits under the enhanced severance plan.

The final decision of the plan administrator in [10] this case was authored by Michael Gillard, on behalf of the plan administrative committee of Ericsson, Inc., and it's contained in this letter dated November 8, 2005, addressed to counsel for the plaintiff. The first page of the letter summarized the undisputed procedural history of the presentation of Mr. Ahuja's claim; then recited the discretionary authority of the plan, administrator, and then quoted from the provisions of Section 8(B) of the enhanced severance plan.

He then observed that the plan administrator had determined that Mr. Ahuja was not eligible for benefits under the plan because the consolidation of Ericsson IPI's offices constituted a reorganization, and Mr. Ahuja was offered continuing employment with Ericsson.

The decision of Mr. Gillard then paraphrased the arguments that had been made by Mr. Ahuja and observed that Mr. Ahuja argues that this section applies only, "in the context of a sale, merger or similar combination with another entity" and that a relocation of offices does not involve another "entity." He then went on to state, "however, nothing in the plan contemplates that such an entity must be a non-Ericsson entity."

In addition, the plain meanings of the word "reorganization" and "entity" would allow the plan [11] administrator to make a reasonable interpretation of separate and distinct geographically located

offices constituted a reorganization involving separate or different entities for the purposes of the plan.

He then concluded by saying that, "based on the foregoing analysis, the intent of the plan and the fact that the plan administrator has consistently interpreted and applied this provision of the plan to every participant in a situation similar to Mr. Ahuja's, the plan administrative committee finds that the plan administrator's denial of benefits to Mr. Ahuja constitutes a reasonable benefit to the plan," and therefore denied his appeal. As I said, the matter now comes before the court based upon both the traditional Rule 56 summary judgment standard, as well as the abuse of discretion review standard which was just described by me from Judge Niemeyer's decision in the Wal-Mart case.

In reviewing the decision of the plan administrator and the upholding of that decision by the plan administrative committee, the question is not whether I would have made this decision or whether I think the decision was a good one or was morally I correct but, rather, whether it was a reasonable one and whether I would have reached the same conclusion is [12] not determinative of the outcome of the case.

I have considered all of the eight factors set forth in Booth versus Wal-Mart Stores. First, I've considered the language of the plan and, as I've already indicated in my colloquy with counsel, there's probably a very special place in hell reserved for the person

who wrote this paragraph. It is not a crystal clear model of clarity, and the question is whether the administrator's interpretation is a reasonable one. I'll come back to the language of the plan in a moment.

Second, I'm required to consider the purposes and goals of the plan. Clearly, the goals and purposes of this plan included keeping Mr. Ahuja with the company when there were turbulent conditions in the industry, rather than having him looking around to go somewhere elsewhere he thought there was less turbulence. And the decision in this case did not involve him in fact losing his job because of turbulence. In fact, he could have maintained his job had he accepted the transfer to Raleigh, North Carolina where the company, for its business reasons, decided to consolidate two offices of the firm, presumably to be more efficient than with operation of two separate offices.

In viewing this plan document as a whole, and [13] looking at the plan administrator's decision, it seems to me to be quite reasonable that one would interpret this not to apply where you simply have been changed in your duty station but you have not lost your job, and the company is going to pay to relocate you.

So, looking at the purposes and goals of the plan, I conclude that that would – that overturning this decision would be inconsistent with the purposes and goals of the plan. I've considered the adequacy of the materials to make the decision and the degree to

which they support it. There is a record that's been placed before the court; it shows the entire history of the case, the various documents involved, a fair elaboration of the positions of the parties, and I conclude that the materials considered in this case were more than adequate to support the decision that was reached.

Fourth, I'm required to consider whether the fiduciary's interpretation was consistent with other provisions in the plan and with earlier interpretations of the plan. I have nothing before me to indicate that the interpretation in this case was inconsistent with other provisions in this plan or with earlier interpretations of this plan. All I have had placed before me is similar but not identical language from [14] the standard severance plan which is designed for a different purpose than this one, and I think that it would be inappropriate for me to, on this standard of review, overturn a decision on the basis of how a different plan with different language had been interpreted.

When one looks at this plan and looks at the language involved, I certainly believe that the interpretation made by the plan administrator and upheld by the plan administrative committee was consistent. I've got nothing before me to indicate that it was inconsistent with other decisions involving this plan – the Enhanced Severance Plan – and therefore, I conclude that that would not permit me to overturn this decision.

I'm required to consider whether the decision-making process was reasoned and principled, and I've already reviewed and read into the record large portions of the decision of the plan administrative committee which clearly was a principled, well-reasoned decision.

I'm required to consider whether the decision was consistent with the procedural and substantive requirements of ERISA, and I have nothing before me to indicate that it was not.

[15] I'm required to consider any external standard relevant to the exercise of discretion, and I'm not aware of any external standard that would apply in this case. The plan itself has a standard providing for a broad range of discretion, and the plan administrator, which is consistent with the analysis in the Wal-Mart case, which is necessary to avoid what, would otherwise be de novo review.

Finally, I'm to consider the fiduciary's motive and any conflict of interest it may have. This would not be the first fiduciary who affiliated with an employer had a conflict of interest. That factor standing alone, though, is not enough to provide for more searching review than would otherwise be provided by the abuse of discretion standard. And while the fiduciary obviously may have had motives and a conflict, I don't find that that would, under the circumstances of this case, justify overturning the decision.

So, let me return back to the language of the plan. One of the factors that I'm not entitled to consider is whether I would come to a different conclusion. In this case I have examined the language involved. And although I get there by perhaps a different route, I don't come to a different conclusion [16] than did the plan administrator or the plan administrative committee in this case. As I've indicated, this was a clause that created considerable and reasonable debate about its meaning because it is subject to some varying interpretations.

The plan administrator came to the conclusion that this was a clause that did exclude benefits under the circumstances of this case. And while I don't arrive at that result by precisely the same route as did the plan administrator, even if I were to come to a different conclusion, that would not be enough now have for me to overturn it. Rather, the question is whether the plan administrator's interpretation was reasonable, and I conclude that this was reasonable. But even if I were to try to put up against the plan administrator's interpretation my own, my own essentially comes to the same result.

As inartfully worded as this clause may be, it is clear that the thrust of this plan was to give some degree of significant assurance to existing Ericsson employees, in a turbulent time, when they might otherwise be looking around for fear of losing their job, that they would keep their job with Ericsson, but with the significant caveat that if you still have a job here, you don't get severance pay. The drafting [17]

leaves a good bit to be desired. But the way I read this – especially since the plan in the definitions section uses the word "entity" as well to refer, basically, to entities within the Ericsson family of companies, I read this to basically mean that should any part of Ericsson – and "part of Ericsson" would be an Ericsson entity – be reorganized, the participant will not be eligible for enhanced severance under this plan if he or she is offered continuing employment with such entity which would be the entity that got reorganized. That's not exactly the way the plan administrator got to that conclusion. But if I were to be asked to interpret this de novo, that's probably how I would conclude.

I also believe that under the provisions of Paragraph 8(C) of the plan that he would also be disqualified, because what happened in this case was his duties as an employee of Ericsson were changed in the sense that his duty station was changed from Rockville, Maryland to North Carolina, and that was clearly the result of an internal reorganization, and the severance of his employment with the company was the result of him declining to accept the transfer, and this is not what the severance plan was designed to protect against.

[18] So, I conclude, for all of those reasons, that the decision of the plan administrator was reasonable, and under the deferential standard that I've articulated from the Booth versus Wal-Mart case, I have no choice but to grant the defendant's motion for summary judgment and deny the plaintiff's.

Now, the defendant has made a request for an award of attorneys' fees in this case, and that's a request that's made under the provisions of Section 1132(g) of Title 29 of the United States Code, which is the portion of ERISA that states in subsection (g)(1), "In any action under this subchapter, other than an action described in Paragraph 2, by a participant, beneficiary or fiduciary, the court, in its discretion, may allow reasonable attorneys fees and costs of action to either party." Cases have made it clear that this is not a provision that is a fee-shifting provision or one that automatically awards fees to the prevailing party. Rather, it's a permissive clause that allows reasonable attorneys fees, and the determination of whether to award it lies completely within the discretion of the court as the Fourth Circuit decided in the Quisenberry versus Life Insurance Company of North America case.

The Fourth Circuit has adopted the analysis [19] announced by the Tenth Circuit in Eaves versus Penn. 37 Fed 2d, 453 in its decision in Reinking versus Philadelphia American Life Insurance company, 910 Fed 2d, 1,210, a 1990 decision of the Fourth Circuit that indicated that when evaluating whether to exercise discretion to award fees, I'm required to consider the degree of the opposing party's culpability or bad faith, the ability of the opposing party to satisfy an award of attorneys' fees, whether an award against the opposing party would deter other persons acting under similar circumstances, whether the party requesting attorneys' fees sought to benefit all

participants and beneficiaries of an ERISA plan or to resolve a significant legal question regarding ERISA itself, and, five, the relative merits of the parties' positions.

I conclude in this case that I will not exercise the discretion to award fees to the defendant. This is not a case in which I believe that the opposing party – namely, the plaintiffs – is culpable or acted in bad faith. This is clearly a clause as to which reasonable persons could differ, and I don't believe it will be appropriate to punish the plaintiff for having, in good faith, asserted its position with respect to the interpretation of this plan, especially in light of the awkwardly-worded language used in the plan which [20] could cause reasonable persons to have a very different view than that which was reached by the plan administrator and the plan administrative committee in this case, So, I decline to award fees in this case.

I will, for all of the reasons that I've just read into the record, enter an order today granting the defendant's motion for summary judgment, denying the plaintiff's cross-motion for summary judgment; I will enter final judgment, therefore, in favor of the defendant and will direct that the case be closed.

Thank you very much.

(Off the record at 11:36 a.m.)

[21] CERTIFICATE

I, Tracy Rae Dunlap, RPR, CRR, an Official Court Reporter for the United States District Court of Maryland, do hereby certify that I reported, by machine shorthand, in my official capacity, the proceedings had and testimony adduced upon the Motions Hearing Proceedings in the case of RITESH AHUJA versus ERICSSON, INC., Civil Action Number RWT-04-3423 on February 5, 2007.

I further certify that the foregoing 20 pages constitute the official transcript of said proceedings, as taken from my machine shorthand notes, of said proceedings.

In witness whereof, I have hereto subscribed my name, this 26th day of February 2007.

TRACY RAE DUNLAP, RPR, CRR
OFFICIAL COURT REPORTER

FILED: June 18, 2008

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 07-1196
(8:05-cv-03423-RWT)

RITESH AHUJA,

Plaintiff-Appellant

v.

ERICSSON, INCORPORATED; ERICSSON STANDARD SEVERANCE PAY PLAN; ERICSSON TOP CONTRIBUTOR ENHANCED SEVERANCE PAY PLAN OF 2004,

Defendants-Appellees

MANDATE

The judgment of this Court, entered 5/12/08, takes effect this date.

This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

/s/ Patricia S. Connor, Clerk

FILED: Jun. 10, 2008

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 07-1196
(8:05-cv-03423-RWT)

RITESH AHUJA,

Plaintiff-Appellant

v.

ERICSSON, INCORPORATED; ERICSSON STANDARD SEVERANCE PAY PLAN; ERICSSON TOP CONTRIBUTOR ENHANCED SEVERANCE PAY PLAN OF 2004,

Defendants-Appellees

ORDER

The Court denies the petition for rehearing and rehearing en banc.

No poll was requested by the Court.

Entered at the direction of the panel: Judge Gregory, Judge Shedd, and Judge Osteen.

For the Court

/s/ Patricia S. Connor, Clerk

CONSTITUTIONAL, STATUTORY, OR OTHER LEGAL PROVISIONS

The relevant provision of the Employee Retirement Income Security Program Act ("ERISA"), is as follows:

> **Civil Enforcement (a) Persons empowered to bring a civil action.** – A civil action may be brought – (1) by a participant or beneficiary – **(B)** to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan . . .

29 U.S.C. § 1132(a)(1)(B) (2000).